Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

GEORGE MICHAEL SHIPSEY,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

I. When is a federal criminal appeal "final" for the purpose of applying this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005) – when this Court denies certiorari or when the court of appeals below subsequently issues its mandate?

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## OPINIONS BELOW

On March 25, 2005, the United States District Court for the Northern District of California denied defendant's motion for a sentence in compliance with *United States v. Booker*, 543 U.S. 220 (2005). (Appendix B) On February 15, 2006, a three-judge panel for the United States Court of Appeals for the Ninth Circuit affirmed the order in an unpublished opinion. (Appendix A) Two previous Ninth Circuit opinions in this case are published at *United States v. Shipsey*, 363 F.3d 962 (9th Cir. 2004) and *United States v. Shipsey*, 190 F.3d 1081 (9th Cir. 1999).

## JURISDICTION

On February 15, 2006, the Ninth Circuit issued an opinion rejecting petitioner's appeal from a district court order, denying petitioner a sentencing hearing under *United States v. Booker*. On March 30, 2006, petitioner filed a timely petition for rehearing and a suggestion for hearing en banc. On June 19, 2006, the petition was denied without comment. Petitioner thereafter sought and received from this Court an extension of time, to and including October 17, 2006, to file the instant petition. (Appendix G) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## STATUTORY PROVISION INVOLVED

Federal Rule of Appellate Procedure ("FRAP") 41 provides:

> **Mandate: Contents; Issuance Effective Date; Stay**
>
> (a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.
>
> (b) When Issued. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.
>
> (c) Effective Date. The mandate is effective when issued.
>
> (d) Staying the Mandate.
>
> (1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.
>
> (2) Pending Petition for Certiorari.
>
> (A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari

petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

## STATEMENT OF THE CASE

Petitioner George Michael Shipsey was originally indicted on the charges underlying this petition on December 21, 1993. In 1997, at the first of two trials, petitioner was convicted on nine counts of fraud and theft from ERISA-qualified pension funds. On September 9, 1999, the Ninth Circuit reversed petitioner's conviction for errors not material to this petition. *United States v. Shipsey*, 190 F.3d 1081 (9th Cir. 1999)

In November 2000, the government obtained a new indictment against petitioner, alleging eight counts of mail fraud (18 U.S.C. § 1341), four counts of wire fraud (18 U.S.C. § 1343), seven counts of theft from ERISA-qualified

pension funds (18 U.S.C. § 664), and two counts of money laundering (18 U.S.C. § 1957). A second trial commenced on May 7, 2002, and the jury returned sixteen counts of conviction on May 23, 2002.

The Presentence Investigation Report ("The Report") in this matter relied on the Federal Sentencing Guidelines to calculate a recommended prison sentence. The Report calculated a total offense level of 18, based on a loss determination of $697,809 and a finding of more than minimal planning, yielding a sentencing range of 30 to 37 months. The jury, however, made no findings as to the loss involved or the amount of planning. Indeed, the Report's factual findings were repeatedly disputed by petitioner. On December 13, 2002, the district court accepted the fact findings of the Report and sentenced petitioner to 30 months in prison on each count, with each term running concurrently to the others.

On April 9, 2004, the Ninth Circuit affirmed petitioner's second conviction, *United States v. Shipsey*, 363 F.3d 962 (9th Cir. 2004), but stayed issuance of its mandate "until final disposition by the Supreme Court." On November 29, 2004, this Court denied the petition for certiorari. (Appendix D) On January 18, 2005, the Ninth Circuit issued its judgment and mandate in petitioner's appeal, sending his case back to the district court for sentencing. (Appendix E) In the interim, on January 12, 2005, this Court issued its decision in *Booker*.

At a hearing on February 11, 2005, petitioner requested a sentence in compliance with the Sixth Amendment, as then clarified by *Booker*. The district court denied petitioner's request on March 25, 2005 and imposed its original 30-month sentence. (Appendix B)

Petitioner filed a timely notice of appeal to the Ninth Circuit on March 29, 2005. On February 15, 2006, the Ninth Circuit affirmed the district court order in an unpublished opinion. (Appendix A)

## REASONS TO GRANT THE PETITION

### I. This Case Raises An Important Unanswered Question Of Federal Law And The Decision Below Is In Conflict With The Law Of Other Circuits

This petition should be granted because the decision below is in conflict with the law of other circuits and raises an unanswered question concerning conflicting provisions of FRAP 41 and the issue of finality in criminal proceedings, which has not been, but should be, settled by this Court. Supreme Court Rule 5(a) and (c).

More specifically, this case raises the central question left unanswered in this Court's recent decision in *Bell v. Thompson*, 545 U.S. 794, 125 S.Ct. 2825 (2005): When exactly does an appeal become final? This case squarely presents the question of whether an appeal is final upon denial of certiorari, as respondent maintains, or upon the subsequent issuance of the court of appeals' mandate, as petitioner contends. The answer requires resolution of the conflicting subsections of FRAP 41 that this Court noted but declined to address in *Bell*, 125 S.Ct. at 2831-32.

On November 29, 2004, this Court denied the petition for certiorari in petitioner's direct appeal from conviction. (Appendix D) The Ninth Circuit issued its mandate seven weeks later on January 18, 2005. (Appendix E) In the

interim, on January 12, 2005, this Court issued its long-awaited decision in *United States v. Booker*. By its own terms, *Booker* applies to all criminal convictions not yet final. 543 U.S. at 268.

On remand, petitioner claimed that because *Booker* was decided before the mandate in his appeal was filed, his case was not yet final, and he was entitled to the benefit of the Sixth Amendment protections described in *Booker* at his sentencing. The significance of the question raised in the instant petition is evidenced by the district court below, which wondered aloud in this case:

> [This case] points out that you really wonder what happens if you have a so-called finality decision [a denial of certiorari], which is hard to figure out when it happens, why it happens, what control there is over . . . what's going on. Because it bothers me that you could have – without any rules that I know of – that could say that instead of sending this [case] back to this Court [on denial of certiorari], they [the Ninth Circuit] could have sat on it [until the mandate issued]. I don't know that there's any rule that says they [the Ninth Circuit] can hold it there until [the mandate issues].

(Appendix B at 7) The district court eventually denied petitioner's Sixth Amendment claim, ruling that petitioner's appeal was final the date certiorari was denied, *i.e.*, before *Booker* was decided. Nonetheless, at a subsequent bail hearing, the district court acknowledged that petitioner would likely receive a "reduced sentence" if *Booker* applied. (Appendix F (granting bail pursuant to 18 U.S.C. § 3143(b)(B)(iv)) The Ninth Circuit affirmed, holding that petitioner was not entitled to a sentence under *Booker* because the mandate in petitioner's direct appeal "should

have issued" immediately following the denial of certiorari. (Appendix A at 2)

In *Bell v. Thompson*, this Court assumed without deciding that a court of appeals may "stay [issuance of] the mandate following the denial of certiorari and also that a court may stay the mandate without an order." 125 S.Ct. at 2832. This apparent black letter and bright line rule is shared among the circuit courts of appeal. *See, e.g., Wilson v. Ozmint*, 357 F.3d 461, 464 (4th Cir. 2004) ("The mandate of the court has not yet issued in this case, and, therefore, we may, at our discretion, amend what we previously decided[.]") (quotation marks and citation omitted); *First Gib. Bank v. Morales*, 42 F.3d 895, 898 (5th Cir. 1995) ("[W]here the mandate has not issued the availability of appeal has not yet been exhausted.") (quotation marks and citation omitted); *United States v. Foumai*, 910 F.2d 617, 620 (9th Cir. 1990) ("[F]inality of an appellate order hinges on the mandate, as does a defendant's expectation of finality."); *Finberg v. Sullivan*, 658 F.2d 93, 99 (3d Cir. 1981) (en banc) ("[A]n appellate court's decision is not final until it issues its mandate[.]"); *Sethy v. Alameda County Water Dist.*, 602 F.2d 894, 897 (9th Cir. 1979) ("This court retain[s] control of the judgment until the mandate issue[s]. Given this retention of control, [appeals are] considered 'pending' in this court until finality was achieved [upon issuance of the mandate]. . . . The district court erred in holding otherwise.")

The principle also is consistent with FRAP 41(b), which provides that a court of appeals may "shorten or extend" the stay of its mandate. Such is precisely what happened in this case. The Ninth Circuit simply delayed issuance of its mandate following denial of certiorari. Pursuant to FRAP 41(c), the mandate is effective when it

is issued, not when it "should have issued," as the Ninth Circuit ruled here, (Appendix A at 2). It follows that petitioner is entitled to the benefit of *Booker* because appeal became final when the mandate issued on January 18, 2005, six days *after Booker* was decided.

However, application of FRAP 41(d)(2)(D) appears to yield a different result, as evidenced by petitioner's case. FRAP 41(d)(2)(D) provides that when a court of appeals stays its mandate in order to permit a party to petition this Court for certiorari, "[t]he court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." Accordingly, the Ninth Circuit ruled in the instant case that the mandate in petitioner's direct appeal "should have issued" when certiorari was denied and "deemed" that the mandate was issued at that time, thereby rejecting petitioner's claim that he was entitled to the constitutional protections (*i.e.*, *Booker*) as they existed at the time the mandate actually issued. (Appendix A)

Resolution of the conflict between *Bell* and FRAP 41(b), on the one hand, and FRAP 41(d)(2)(D) on the other, is critical to clarifying the important, yet often-elusive concept of "finality" in criminal cases. It is also critical to petitioner. If his appeal became final upon issuance of the mandate, according to the procedure described in *Bell*, then he is entitled to the benefit of *Booker* and (potentially) a reduced prison term.

Petitioner was convicted in a complex scheme involving multiple counts of mail and wire fraud, theft from an employee benefit plan, and money laundering, dating back to 1993. At sentencing, he contested the amount of loss calculated by the government, which served as the basis

for his 30-month prison term imposed under the then-mandatory Federal Sentencing Guidelines. When petitioner raised his *Booker* claim on remand, the district court ruled that petitioner would "likely" receive a "reduced sentence" if *Booker* ap lied to his case. (Appendix F) (Granting bail under 18 U.S.C. § 3143(b)(B)(iv))

This Court should grant the instant petition to clarify the question left unanswered by *Bell*; to correct the Ninth Circuit's mistaken judgment that petitioner's appeal became final prior to issuance of its own mandate; and to provide petitioner an opportunity to confront the government's evidence at sentencing according to the constitutional protections provided by *Booker*.

## II. An Appeal Is Not Final Until The Mandate Issues

### A. The Ninth Circuit Did Not Abuse Its Discretion In Continuing To Stay Its Mandate In Petitioner's Case After Certiorari Was Denied

In *Bell*, this Court ruled by a 5-4 vote that the Sixth Circuit Court of Appeals abused whatever discretion it had under FRAP 41 by staying its mandate in a state habeas preceding for over five months before amending its original opinion. 125 S.Ct. at 2832. The instant case is distinguishable.

Here, the Ninth Circuit did not revisit its original opinion after this Court denied certiorari in petitioner's direct appeal. It merely delayed issuance of its mandate (perhaps in anticipation of this Court's awaited decision in *Booker*) before returning the case to the district court. The Ninth Circuit has repeatedly held that it has authority to withhold issuance of its mandate, without order, under

FRAP 41(b), even after certiorari had been denied. *See, e.g., Beardslee v. Brown*, 393 F.3d 899, 901 (2004) (citing the court's "inherent authority" with withhold issuance of its mandate); *see also United States v. Foumai*, 910 F.2d 617, 620 (9th Cir. 1990) ("The jurisdiction of the court of appeals does not terminate until issuance of the mandate."); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) ("An appellate court's decision is not yet final until its mandate issues."); *United States v. Ross*, 654 F.2d 612, 616 (9th Cir. 1981) ("Until the mandate is issued, a case is not closed.")

Unlike *Bell*, the Ninth Circuit waited less than two months in issuing its mandate after this Court denied certiorari. Also unlike *Bell*, this case does not involve a habeas petition from a state inmate where the bounds of a federal court's discretion under FRAP 41 are narrower. *See Bell*, 125 S.Ct. at 2831 (quoting *Calderon v. Thompson*, 523 U.S. 538 (1998)). It follows that the Ninth Circuit did not abuse its discretion in delaying issuance of its mandate in this case.

### B. The Ninth Circuit Erred In Ruling That The District Court "Lacked Authority" To Modify Petitioner's Sentence Regardless Of When Petitioner's Appeal Became Final

In its unpublished opinion (Appendix A), the Ninth Circuit ruled that regardless of when petitioner's sentence became final, the district court had no authority to sentence petitioner under *Booker* because petitioner raised his *Booker* claim after the Ninth Circuit issued its decision affirming petitioner's conviction on direct appeal in *United States v. Shipsey*, 363 F.3d 962 (9th Cir. 2004). The Ninth Circuit ruled that after its affirmance, the district court

"lacked authority" to address any issue outside the scope of the appellate court decision and remand. (Appendix A at 2)

This decision gets the so-called "rule of mandate" exactly backward. As this Court has repeatedly held, a lower court handling a case on remand "may consider and decide *any* matter[]" that was not waived or explicitly decided above. *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (emphasis added) (quotation marks and citation omitted). " 'While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues.' " *Ibid.* (quoting *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939)); *accord. Rogers v. Hill*, 289 U.S. 582, 587-88 (1933); *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920); *United States v. Ruiz-Alvarez*, 211 F.3d 1181, 1185 (9th Cir. 2000); *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986); *Guse v. J.C. Penny Co.*, 570 F.2d 679 (7th Cir. 1978).

Here, the Ninth Circuit's decision affirming petitioner's direct appeal was filed before *Blakely v. Washington*, 542 U.S. 296 (2004), and *Booker* were decided. It was therefore impossible for the Ninth Circuit's decision affirming petitioner's conviction to embrace sentencing issues raised in those cases. It follows under the "rule of mandate" that the petitioner's claim for a sentencing hearing under *Booker* was properly raised for the first time in district court after the Ninth Circuit's mandate issued. *Quern*, 440 U.S. at 347 n.18; *Nguyen*, 792 F.2d at 1502. Moreover, the Ninth Circuit's contention that the district court could not entertain petitioner's sentencing motion regardless of when his appeal became final creates an impermissible conflict between a judge-made rule and federal constitutional protections, which petitioner enjoys under *Booker*. *See Edward J. DeBartolo Corp. v. Florida*

*Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988).

### III. The Ninth Circuit Erred By Failing To Recognize The District Court's Order That Petitioner Would Likely Receive A "Reduced Sentence" If *Booker* Applied

On June 24, 2005, the district court granted petitioner bail pending the outcome of this appeal, pursuant to 18 U.S.C. § 3143(b)(B)(iv). (Appendix F) In so doing, the district court necessarily concluded that if *Booker* applied to petitioner's case then petitioner would "likely" receive "a reduced sentence." 18 U.S.C. § 3143(b)(B)(iv) The Ninth Circuit's failure to recognize the district court's acknowledgment that *Booker* would likely influence its sentencing decision constitutes another error in this case and should weigh in favor of granting the instant petition.

## CONCLUSION

For the reasons stated, this Court should grant the instant petition and order briefing and argument on the case in this Court.

Dated: October 17, 2006 Respectfully submitted,

DENNIS P. RIORDAN
*Attorney for Petitioner*
*George Michael Shipsey*

166 Fed. Appx. 963

**APPENDIX A**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>GEORGE MICHAEL SHIPSEY,<br>Defendant-Appellant. | No. 05-10207<br>DC No. CR 93-0624 DLJ<br>MEMORANDUM*<br>(Filed Feb. 15, 2006) |

Appeal from the United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding

Argued and Submitted January 13, 2006
San Francisco, California

Before: NOONAN, TASHIMA, and W. FLETCHER, Circuit Judges.

George Michael Shipsey appeals the district court's denial of his motion for resentencing pursuant to *United States v. Booker,* 543 U.S. 220 (2005), after this court affirmed his conviction on 16 counts of fraud and theft from an employee pension fund. *See United States v. Shipsey,* 363 F.3d 962 (9th Cir.), *cert. denied,* 543 U.S. 1004 (2004). We have jurisdiction pursuant to 18 U.S.C.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

§ 3742(a) and 28 U.S.C. § 1291. We affirm the district court's denial of Shipsey's motion for resentencing. We also deny Shipsey's motion to recall the mandate in his prior appeal, No. 02-10651.[1]

The district court correctly concluded that, because the mandate had issued in Shipsey's prior appeal, the appeal was final.[2] No sentencing issues had been raised in that appeal and Shipsey's conviction had been affirmed; the district court accordingly lacked authority to modify the sentence. *See United States v. Penna,* 319 F.3d 509, 511 (9th Cir. 2003) ("A court generally may not correct or modify a prison sentence once it has been imposed."); *United States v. Ruiz-Alvarez,* 211 F.3d 1181, 1184 (9th Cir. 2000) ("A district court's authority to resentence defendants must 'flow' from a court of appeals mandate or Federal Rule of Criminal Procedure 35.") (citation omitted).

As for the gap between the Supreme Court's denial of Shipsey's petition for writ of certiorari on November 29, 2004, and the issuance of the mandate by this court on January 18, 2005, we note that the federal rules require that "[t]he court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." Fed. R. App. P. 41(d)(2)(D). Our docket indicates that the Court's order denying certiorari, was filed on December 3, 2004. Thus, the mandate should have issued on December 3.

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[1] At oral argument, Shipsey was permitted to make an oral motion to recall the mandate.

[2] Because the parties are familiar with the facts and the procedural history of this case, we do not recite them here except as necessary to aid in understanding this disposition.

There is no indication in the docket that any judge requested that issuance of the mandate be stayed, and Shipsey himself made no so request. The failure to comply with Rule 41(d)(2)(D) therefore appears to have been a clerical oversight. We thus deem that the mandate issued *nunc pro tunc* on December 3, 2004. The appeal accordingly was final prior to the Supreme Court's decision in *Booker.*[3] *See also Bell v. Thompson,* 125 S. Ct. 2825, 2833 (2005) (addressing Rule 41 and stating that, "[a]s a practical matter, a decision by this Court denying discretionary review usually signals the end of litigation. While Rule 41(b) may authorize a court to stay the mandate after certiorari is denied, the circumstances where such a stay would be warranted are rare.").

For the foregoing reasons, we conclude that the district court did not err in declining to resentence Shipsey.

As indicated earlier, we permitted Shipsey to make an oral motion to recall the mandate in his prior appeal, No. 02-10651. To facilitate our review of that motion, defense counsel submitted the December 13, 2003, sentencing transcript following oral argument. After reviewing that transcript, we do not agree with Shipsey that, at that sentencing, the district court indicated that it might have imposed a lower sentence had it known that the Sentencing Guidelines were merely advisory. Thus, unlike *United States v. Crawford,* 422 F.3d 1145 (9th Cir. 2005), in which the sentencing judge had expressed explicit reservations about the sentence required under the mandatory sentencing guidelines, this case does not present extraordinary

[3] *Booker* was decided on January 12, 2005. *See* 543 U.S. 220.

circumstances sufficient to justify recalling the mandate. *See United States v. King*, 419 F.3d 1035, 1035-36 (9th Cir. 2005) (concluding that extraordinary circumstances sufficient to justify recalling the mandate did not exist where, at best, the defendant only would be entitled to a limited remand for the sentencing judge to determine whether or not to resentence). The motion to recall the mandate accordingly is denied.

**AFFIRMED.**

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| UNITED STATES OF AMERICA, | No. C 93-00624 DLJ |
| Plaintiff, | San Francisco, California |
| vs. | March 25, 2005 |
| GEORGE MICHAEL SHIPSEY, | 10:00 a.m. |
| Defendant. / | |

COPY

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE D. LOWELL JENSEN
UNITED STATES DISTRICT JUDGE

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

[11]* * *

THE COURT: And I'm the one that's supposed to be following their rules in terms of when finality happens. And what you're saying is that there are some circumstances where the circuit court could say it's not final for us, and we're going to be able to hear this, but they told me it's final, basically, by sending it down here they remanded it after the – the Supreme Court has denied certificate. And so it's back here under those circumstances and under the regular sort of ways in which trial courts look at this when I decide what is finality, there's a fixed date, and that's the date on certificate. And if it – if it's not a fixed date on certificate, I have to go back

into the individual file and find out how long they – they stayed, waiting to send it back.

MR. RIORDAN: Well, Your Honor, actually the task is not burdensome because it's simply an individual case when – when the judgment returns to this Court from the Ninth Circuit.

[12] I mean that's easily ascertainable in a case such as this.

THE COURT: Yes.

MR. RIORDAN: I suppose – I suppose that we are – we are dealing with a fairly discreet class of cases.

THE COURT: Yes.

MR. RIORDAN: In this instance.

THE COURT: Well, that's – you seem to suggest, Mr. Leigh, aren't there cases that say that the circuit could remand to the trial court even though there was a petition for certiorari still undecided.

MR. LEIGH: There are cases that say the mandate can issue during the pendency have a petition for certiorari unless – well, not cases that I'm aware of, but a rule, Federal Rule 41(d)(2) I believe, basically says that following the expiration of the denial for petitions or hearing for rehearing at the courts of appeal level, a mandate shall issue by this circuit or by any circuit, and that shall not – and shall issue unless the Court of Appeals at that point issues a stay.

And if it doesn't issue to a stay, you could have the situation – which – I believe has happened although I can't give the Court a precise [13] case – where a petition

for certiorari is pending, but the mandate is issued, and – but the petition for certiorari to the Supreme Court is still pending.

So if you are talking about the quirkiness of this issuance of mandate rule, it gets even quirkier when you consider situations like that.

THE COURT: I would doubt seriously whether you would say if a case came down between the time that the circuits mandate and the decision by the Supreme Court on certiorari – that would still not be final for consideration of the trial Court until the certiorari decision is made.

MR. LEIGH: Oh.

THE COURT: But it does – it points out that you really wonder what happens if you have a so-called finality decision, which is hard to figure out when it happens, why it happens, what control there is over, I mean what's going on. Because it bothers me that you could have – without any rules that I know of that could say that instead of sending this back to this Court in January of 2005, they could have set it in April. I don't know that there's any rule that says they can hold it there until it comes back.

MR. RIORDAN: Well, Your Honor, actually there's a fact specific to this case which is of great [14] importance.

Mr. Leigh is absolutely correct that after the Ninth Circuit rules – as it did in this case – the presumption is that the mandate will issue.

THE COURT: Right.

MR. RIORDAN: And it does issue absent a stay.

So let's consider a case – let's say that had occurred in this case. The Ninth Circuit mandate had issued, and, in fact, that don't defeat the right of the defendant to seek certiorari, but obviously if the Ninth Circuit's mandate had issued and the United States Supreme Court then denied certificate, the last event on appeal would obviously be the denial of certificate, but in this case the Ninth Circuit specifically granted a stay of its mandate on July 27, 2004.

THE COURT: Pending the decision on the certificate?

MR. RIORDAN: Pending the decision on certificate.

THE COURT: Yes.

MR. RIORDAN: So unlike the situation where mandate, had it issued the Ninth Circuit said we are going to control jurisdiction over this until after the certificate petition, and they retain jurisdictions of [15] it through the certificate petition until they remanded it to this Court on January 18th.

So I would say that in a case in which the Ninth Circuit or any Appelate Court has granted a stay to seek certiorari and therefore maintain jurisdiction over the case, the relevant date for the end of the appeal under Beardsley is the issuance of mandate on January 18.

THE COURT: But that – that omits the reason for the stay. The stay pending certificate decisions. And the stay then expires when the certificate is submitted.

MR. RIORDAN: I would respectfully submit under Beardsley when the mandate is issued because Beardsley says until that's the case they can re-open the case and the case law is substantial, that says the reason that they might re-open as an intervening United States Supreme Court decision.

THE COURT: But there was also another stay in Beardsley that after the certificate decision came down they commanded another stay. So they weren't operating on the stay from the certificate decision, they were operating on another stay. They were exercising their own authority because the case was still there. It hadn't gone.

[16] MR. RIORDAN: I don't dispute the Court's recitation of the facts, but the principle that they enunciated, Your Honor, was that they maintained jurisdiction to re-open the case until the mandate issued, that they – they didn't – by my reading of Beardsley – refer to the extraordinary double stay situation in making – in making that ruling.

THE COURT: Yes.

Is there anything further.

MR. LEIGH: Your Honor, just very briefly on this, I look at the language of – I look at this very simply, look at the language of Booker which says it only applies to cases pending on, quote, "district review," and you look to what the meaning of district review is and what the Supreme Court would have been thinking of when it used that language, and you come back to a bright line, and that bright line which I don't think the Court should blur is the denial of certiorari, or the expirations of the period

for filing certiorari, and that's what I would urge on the Court.

THE COURT: Interesting situation. But from what I can see Beardsley doesn't change structure for this Court. This Court is now in a position where this case had been sent back to me by the Ninth Circuit and I am supposed to decide whether Booker decides and [17] rules, of whether Booker applies to cases that are pending on appeal, and cases pending on appeal aren't pending on appeal after there's been a denial of certificate.

If the Ninth Circuit wanted to keep it, they could keep it. If they didn't, they could send it back to me. And I think if they tried to have a new line for – for what's final, that be a case by case depending upon what the – the circuit does getting their mail together, I don't see we have much on line. I don't want to say Beardsley changes the line for District Court in terms of whether or not a precedent which applies to cases pending on review is pending after the certificate has been denied by the Supreme Court.

Now, so I think the case was final at the time with a certificate was denied, and that's the level of finality that should be applied by the District Court.

* * *

**APPENDIX C**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>GEORGE MICHAEL SHIPSEY,<br>Defendant-Appellant. | No. 05-10207<br>DC No. CR 93-0624 DLJ<br>ND Cal.<br>**ORDER**<br>(Filed Jun. 19, 2006) |

Before: NOONAN, TASHIMA, and W. FLETCHER, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Fletcher votes to deny the petition for rehearing en banc and Judges Noonan and Tashima so recommend. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for panel rehearing and the petition for rehearing en banc are denied.

## APPENDIX D

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479-8011

November 29, 2004

Mr. Dennis P. Riordan
523 Octavia Street
San Francisco, CA 94102

Re: George Michael Shipsey
v. United States
No. 04-554

Dear Mr. Riordan:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

**APPENDIX E**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>GEORGE MICHAEL SHIPSEY,<br>Defendant-Appellant. | No. 02-10651<br>DC No. CR 93-00624 DLJ<br>**JUDGMENT** |

Appeal from the United States District Court for the Northern Division of California (Oakland).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern Division of California (Oakland) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered Friday, April 09, 2004.

**APPENDIX F**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>vs.<br>GEORGE MICHAEL SHIPSEY,<br>Defendant. | No. CR 93-00624-DLJ<br>**ORDER GRANTING RELEASE ON BAIL PENDING APPEAL**<br>(Filed Jun. 27, 2005) |

Having considered the pleadings and heard argument on the matter, the Court hereby adopts its oral ruling issued on June 24, 2005, and grants defendant's motion for release on bail pending appeal. All previous conditions for release remain in place.

Dated: June 27, 2005 /s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

## APPENDIX G

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479-8011

September 7, 2006

Mr. Dennis P. Riordan
523 Octavia Street
San Francisco, CA 94102

Re: George Michael Shipsey
v. United States
Application No. 06A242

Dear Mr. Riordan:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on September 7, 2006 extended the time to and including October 17, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

**William K. Suter**, Clerk

by /s/ Jeffrey Atkins
Jeffrey Atkins
Supervisor – Case
Analyst Division